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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 PAUL DENHAM,) Civil No. 09-1505-JLS(WVG)
12)
13 Plaintiff,) ORDER DENYING MOTION FOR
14) REHEARING OF MOTION REQUESTING
15 v.) CDCR TO PROVIDE FULL LEGAL
16) NAMES OF DEFENDANTS ARANDA AND
17 ARANDA, et al.,) BENVIN; AND ORDER THE USDC
18) CLERK TO SERVE DEFENDANTS
19 Defendants.) ARANDA AND BENVIN BY
20) PUBLICATION
21) (DOC. # 67)
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19 On May 16, 2011, the Court denied Plaintiff's Motion For
20 Order For CDCR To Provide Full Legal Names of Aranda and Benvin And
21 Order the USDC Clerk To Serve Defendants Aranda and Benvin By
22 Publication. On June 6, 2011, Plaintiff filed a Motion for Rehearing
23 of that Motion. The Court construes the June 6, 2011 Motion to be a
24 Motion for Reconsideration.

25 In the June 6, 2011 Motion, Plaintiff argues that the Court's
26 May 16, 2011 order unreasonably applied state law and will cause him
27 prejudice in not being able to serve Defendants Aranda and Benvin
28 (hereafter "Defendants").

1 Procedural History

2 On July 10, 2009, Plaintiff filed a Complaint Under The Civil
3 Rights Act, 42 U.S.C. §1983. On August 31, 2009, the Court granted
4 Plaintiff's Motion to Proceed *in forma pauperis*, and directed the
5 United States Marshal to effect service of summons and complaint on
6 Defendants. On October 27, 2009, the summonses served on Defendants
7 Aranda and Benvin were returned unexecuted.^{1/}

8 On December 4, 2009, Defendants served and filed a Motion to
9 Dismiss Plaintiff's Complaint. On May 3, 2010, this Court filed a
10 Report and Recommendation Granting Defendants' Motion to Dismiss. On
11 June 21, 2010, the District Judge assigned to this case adopted the
12 Report and Recommendation and allowed Plaintiff to file a First
13 Amended Complaint. On July 30, 2010, Plaintiff filed a First Amended
14 Complaint.

15 On August 12, 2010, Defendants filed a Motion to Dismiss
16 Plaintiff's First Amended Complaint. On December 30, 2010, this
17 Court filed a Report and Recommendation Granting in part and Denying
18 in part Defendants' Motion to Dismiss. On February 4, 2011, the
19 District Judge assigned to this case adopted the Report and
20 Recommendation.

21 On March 16, 2011, Plaintiff filed a Motion for Court Order
22 for Substituted Service on the Secretary of State for Defendants
23 Aranda and Benvin. On March 21, 2011, Plaintiff filed Motions for
24 Leave of Court for Enlargement of Time To Complete Service on
25 Defendants, and for a Court Order For Substituted Service on the
26 Attorney General and/or the Secretary of State or the California

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28 ^{1/} On October 27, 2009, the summons served on Defendant Silvia Garcia
also was returned unexecuted. On May 16, 2011, Ms. Garcia's attorney
waived the service of summons on her behalf.

1 Department of Corrections and/or Litigation Coordinator at Donovan
2 State Prison.

3 On March 25, 2011, the Court granted in part the motions
4 noted in the preceding paragraph. The March 25, 2011 Order directed
5 Defendants' counsel to provide the last known addresses of Defen-
6 dants Aranda and Benvin to the United States Marshal in a confiden-
7 tial memorandum and for the United States Marshal to serve those
8 Defendants at their last known addresses, as contained in the
9 confidential memorandum, with summonses and Plaintiff's First
10 Amended Complaint. On April 28 and May 2, 2011 respectively, the
11 summonses for Aranda and Benvin were returned unexecuted.

12 On May 12, 2011, Plaintiff filed a Motion to Serve Defendants
13 By Publication. On May 16, 2011, the Court denied the Motion.
14 Plaintiff now seeks reconsideration of that Order.

15 Discussion

16 Plaintiff argues that the Court's May 16, 2011 Order
17 misinterpreted California law. However, Plaintiff is mistaken.

18 California Code of Civil Procedure § 415.50 states in
19 pertinent part:

20 (a) A summons may be served by publication if upon
21 affidavit it appears *to the satisfaction of the court*
22 in which the action is pending that the party to be
served cannot with *reasonable diligence* be served in
another manner specified in this article...
(emphasis added)

23 In order for Plaintiff to invoke California Code of Civil
24 Procedure §415.50, he must show that he has exercised *reasonable*
25 *diligence* to locate the person whom he wishes to serve, in order to
26 give that person notice of the action before resorting to the notice
27 afforded by publication. Donel v. Badalian, 87 Cal. App. 3d 327, 332
28 (1978).

1 When notice is a person's due, process which a mere
 2 gesture is not due process. The means employed must be
 3 such as one desirous of actually informing the
 4 absentee might reasonably adopt to accomplish it. *The*
 5 *reasonableness... of any chosen method may be defended*
 6 *on the ground that it is itself reasonably certain to*
 7 *inform those affected, or where conditions do not*
 8 *reasonably permit such notice, the that form chosen is*
 9 *not substantially less likely to bring home notice*
 10 *than other of feasible and customary substitutes.*
 11 Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315
 12 (1950)(citations omitted)(emphasis added).

13 "When substituted or constructive service is attempted,
 14 strict compliance with the letter and spirit of the statutes is
 15 required." Kott v. Superior Court, 45 Cal. App. 4th 1126, 1137
 16 (1996)[citing Olvera v. Olvera, 232 Cal. App. 3d 32, 41 (1991)].

17 "Reasonable diligence" in attempting to locate a party to be
 18 served

19 denotes a thorough, systematic investigation and
 20 inquiry in good faith by the party... a number of
 21 honest attempts to learn (a) defendant's whereabouts
 22 or his address by inquiry of relatives, friends and
 23 acquaintances, or of his employer, and by investiga-
 24 tion of appropriate city and telephone directories,
 25 the voters' register, and the real and personal
 26 property index... near the defendant's last known
 27 address, are generally sufficient. These are likely
 28 sources of information, and *consequently must be*
 29 *searched before resorting to service by publication.*
 30 Kott, 45 Cal. App. 4th at 1137. (emphasis added).

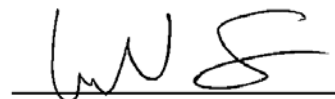
31 A *pro se* Plaintiff proceeding *in forma pauperis* is entitled
 32 to rely on the U.S. Marshal for service of the summons and com-
 33 plaint. Walker v. Sumner, 14 F.3d 1415, 1422 (9th Cir. 1994)
 34 *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995);
 35 Moody v. Finander, 2010 WL 2354586 at *3 (S.D. Cal. 2010); McKenzie
 36 v. Hernandez, 2010 WL 685005 (S.D. Cal. 2010). However, a *pro se*
 37 Plaintiff proceeding *in forma pauperis* " 'may not remain silent and
 38 do nothing to effectuate service (on a defendant)', rather, '(a)t a

1 minimum, (he) should request service upon the... defendant and
2 attempt to remedy any apparent defects of which (he) has knowl-
3 edge.'" Moore v. Lacy, 2010 WL 5644658 at *7 (S.D. Cal.
4 2010)[quoting Rochon v. Dawson, 828 F.2d 1107, 1110 (5th Cir. 1987)].

5 Here, Plaintiff's application to serve the Defendants by
6 publication is deficient. Plaintiff has failed to show that he
7 exercised reasonable diligence in locating the Defendants. There-
8 fore, any judgment against the Defendants based on service by
9 publication would be void. Olvera, 232 Cal. App. 3d at 41.
10 Moreover, Plaintiff has not performed (or had someone perform on his
11 behalf) an appropriate investigation into public records, as noted
12 in Kott, which might be deemed sufficient before service by
13 publication would be proper. Moreover, Plaintiff has not presented
14 any authority, nor has the Court found any authority, to suggest
15 that the U.S. Marshal must perform that investigation. Consequently,
16 it does not appear to the satisfaction of the Court that Plaintiff
17 has strictly complied with the letter and spirit of California Code
18 of Civil Procedure § 415.50.

19 As a result, Plaintiff's Motion for Reconsideration is
20 DENIED.

21 DATED: June 9, 2011

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24 Hon. William V. Gallo
25 U.S. Magistrate Judge
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